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1	May 29 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 29 1990		Brief of respondent Arkansas in opposition filed.
4	Jul 5 1990		DISTRIBUTED. September 24, 1990
6	Oct 1 1990		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall. (Detached opinion.)

****

EDITOR'S NOTE

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89-7631

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM FRANK PARKER
Petitioner,

v.

ARKANSAS

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I.

WHETHER THE DOUBLE JEOPARDY PROHIBITION OF THE UNITED STATES CONSTITUTION PROHIBITS A STATE TO RETRY A DEFENDANT ON A CHARGE OF CAPITAL MURDER AFTER A CONVICTION OF CAPITAL MURDER IS DISMISSED BY AN APPELLATE COURT FOR FAILURE OF PROOF ON ANOTHER FORMULATION OF THAT OFFENSE.

II.

WHETHER THE RELIABILITY REQUIREMENT OF THE EIGHTH AMENDMENT IS VIOLATED BY A DEATH SENTENCE BASED UPON CONTRADICTORY FINDINGS BY THE SENTENCING JURY.

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THE DOUBLE JEOPARDY PROHIBITION OF THE UNITED STATES CONSTITUTION PROHIBIT A STATE TO RETRY A DEFENDANT ON A CHARGE OF CAPITAL MURDER AFTER A CONVICTION OF CAPITAL MURDER IS DISMISSED BY AN APPELLATE COURT FOR FAILURE OF PROOF ON ANOTHER FORMULATION OF THAT OFFENSE.

THE RELIABILITY REQUIREMENT OF THE EIGHTH AMENDMENT IS VIOLATED BY A DEATH SENTENCE BASED UPON CONTRADICTORY FINDINGS BY THE SENTENCING JURY.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM FRANK PARKER
Petitioner,

v.

ARKANSAS

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ARKANSAS

The Petitioner, William Frank Parker, a prisoner under sentence of death in the State of Arkansas, petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas. On November 6, 1989, that court affirmed Petitioner's conviction and sentence of death. His court-appointed counsel was then relieved, and he was without counsel.

An execution date of February 28, 1990, was set by the Governor of Arkansas. Parker had been reported to have made informal remarks that he wanted to appeal no further, despite the fact that only a direct appeal to state court had been heard and he had no counsel. He had not been brought before a court for a waiver of appeal nor had his sanity

been examined (despite the fact that insanity was part of his trial defense), all of which was in violation of Arkansas case law regarding dropping of capital appeals without an evaluation on competency. Jeff Rosenzweig, one of the attorneys on this petition, attempted to intervene as a next friend in the Arkansas Supreme Court. The intervention request was denied. *Rosenzweig v. State*, 301 Ark. 475, 784 S.W.2d 776 (1990).

Rosenzweig then filed a next friend habeas corpus petition in the United States District Court. The District Judge granted a temporary stay to examine the petition on its merits. While the stay was in effect, Parker decided to continue his appeal, and, without objection, the stay remains in effect for Parker to pursue his appeal.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is appended hereto. It is reported as *Parker v. State*, 300 Ark. 360, 779 S.W. 2d 156 (1989).

JURISDICTION

Jurisdiction is founded on 28 U.S.C. 1257. Petitioner alleges a deprivation of rights secured by the United States Constitution. The opinion of the Supreme Court of Arkansas was issued on November 6, 1989. Parker's court-appointed

lawyers were relieved, and he was without counsel until volunteer counsel was located after expiration of the 90 days for filing a petition for certiorari. Therefore, with this Petition, Parker also files a petition for permission to file a writ of certiorari out of time.

CONSTITUTIONAL PROVISIONS

Fifth Amendment:

> *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be..deprived of life, liberty or property without due process of law.*

Eighth Amendment:

> *...nor cruel and unusual punishments inflicted..*

Fourteenth Amendment:

> *...nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.*

STATEMENT OF THE CASE

William Frank Parker was convicted of capital murder and sentenced to death in 1985 in the deaths of his former in-laws. He was also convicted of assorted other offenses in the incident for which he now serving life plus 130 years and which will be unaffected by positive action taken on this petition. His conviction was reversed on the ground that the State had not proved that the murders were in the "course and furtherance" of the burglary, the alleged asso-

ciated felony in the capital murder formulation. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987). His death sentence was also reversed because of the absence of evidence of an aggravating circumstance.

The State retried him under a different formulation of capital murder, premeditatedly causing the deaths of two persons in the same criminal episode. Parker's double jeopardy objections were overruled in the trial court and in the Arkansas Supreme Court. *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989). His conviction and sentence were affirmed on all points, including the other point presented for consideration on certiorari here, contradictory jury findings on aggravation and mitigation.

REASONS FOR GRANTING THE WRIT

I.

THE DOUBLE JEOPARDY PROHIBITION OF THE UNITED STATES CONSTITUTION PROHIBIT A STATE TO RETRY A DEFENDANT ON A CHARGE OF CAPITAL MURDER AFTER A CONVICTION OF CAPITAL MURDER IS DISMISSED BY AN APPELLATE COURT FOR FAILURE OF PROOF ON ANOTHER FORMULATION OF THAT OFFENSE.

Parker's conviction of capital murder and sentence of death were entered in flagrant violation of the double jeopardy prohibitions of the United States Constitution (and the Arkansas Constitution as well). The Arkansas Supreme Court extended the "trial error" exception to the double jeopardy rules far beyond what this Court has recognized and in a way that makes a nullity of the double jeopardy clause. This Court should summarily vacate the conviction and sentence, or, in the alternative, set the matter for plenary consideration to determine the applicability of double jeopardy rules to this situation.

Parker originally was convicted of capital murder and sentenced to death under what was then Ark. Stat. Ann. 41-1501(1)(a) and is now Ark. Code Ann. 5-10-101(a)(1), murder in the course of a burglary. The conviction and death sentence for capital murder were set aside for failure of proof; the underlying felony was deemed by the Arkansas Supreme Court to be part of the offense and did not have the required independence from the homicide act necessary to meet the quantum of proof to be felony murder. *Parker v.*

State, 292 Ark. 421, 731 S.W.2d 756 (1987). The other convictions and sentences arising from the incident were affirmed and are not under challenge. Even if the capital murder conviction is reversed and dismissed, Parker will be serving a sentence of life plus 130 years. A copy of the opinion is found in the appendix, but it is appropriate to quote the salient language:

> The killings were obviously a form of criminal homicide of some degree, but they were not "in the course of and in furtherance of" the burglary as required to be capital felony murder. Parker could have been charged under subsection (1)(c) of 41-1501 (later Ark. Code Ann. 5-10-101(a)(3): causing the death of two or more persons in the course of the same criminal episode). Instead, the prosecutor elected to proceed under subsection (1)(a), which was wrong. We must reverse. At 758.

The State then undertook to retry Parker under a different formulation of capital murder, that of the premeditated killing of two or more persons in the same episode. The circuit court permitted this evasion of double jeopardy prohibitions, and the Supreme Court affirmed the conviction and sentence. The Arkansas court asserted that the dismissal of the original conviction on appeal was because of "trial error" and then went on to explain that the "trial error was in charging and trying Parker under the wrong capital murder provision." 779 S.W.2d at 157.

This is, at the very least, a ludicrously erroneous

definition of "trial error" and takes it far beyond what this Court has recognized. The failure to charge the case correctly and to proceed through trial on the charge, or the failure to meet the requisite quantum of proof, is not "trial error" in this Court's definition of the term. This characterization as "trial error" is but a talismanic invocation of a double jeopardy exception not justified here by either the law or the facts.

This Court discussed the trial error/evidentiary insufficiency dichotomy in *Burks v. United States*, 437 U.S. 1 (1978):

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just a society maintains a valid concern for insuring that the guilty are punished. (citation omitted)
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has

> been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have been *submitted* (emphasis in original) to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant, when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. 437 U.S. at 15-16.

The Fifth Amendment, incorporated to the states by the Fourteenth, states succinctly: " nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Double jeopardy forbids reprosecution when there is a failure of proof in the original prosecution. *Burks*, supra, 437 U.S. 1 (1978). *Greene v. Massey*, 437 U.S. 19 (1978). *Hudson v. Louisiana*, 450 U.S. 40 (1981). The prosecution bears the risk of failure to attain its burden of proof. If double jeopardy means anything at all, it means that a state cannot continue to retry a defendant until it hits upon a formulation for which it has sufficient evidence.

The Arkansas court mistakenly relied upon *Montana v. Hall*, 481 U.S. 400 (1987), a case dealing with an altogether different problem. In *Hall*, the first trial was nullified upon an appellate finding that the crime charged did not

exist at the time of the offense. In this case, capital murder existed; the State elected to charge a formulation that, as it turned out, it was not able to prove.

The State had the power to bring alternative formulations of capital murder before the jury, *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989), but it did not do so, and under the double jeopardy clause, bears the risk of failure.

This Court should grant the petition for writ of certiorari and summarily vacate Parker's conviction and death sentence. Alternatively, the Court should grant certiorari to discuss the application of double jeopardy analysis to the definition of trial error espoused by the Arkansas Supreme Court. This case meets the criteria of this Court for consideration on certiorari. Rule 10.1(b) and (c).

II.

THE RELIABILITY REQUIREMENT OF THE EIGHTH AMENDMENT IS VIOLATED BY A DEATH SENTENCE BASED UPON CONTRADICTORY FINDINGS BY THE SENTENCING JURY.

This issue presents the Court with an opportunity to discuss the Eighth Amendment reliability requirement of a capital sentencing determination in the light of contradictory penalty phase findings.

Only one aggravating circumstance was found by the sentencing jury: That Parker had committed a prior violent

felony. Ark. Code Ann. 5-4-604, formerly Ark. Code Ann. 41-1303. The jury found no unanimous mitigating circumstances, but it found the non-unanimous mitigating circumstance of "no significant history of prior criminal activity." Ark. Code Ann. 5-4-605, formerly Ark. Stat. Ann. 41-1304.

On appeal, Parker argued that a death penalty based upon such an inherent contradiction could not stand. The Arkansas Supreme Court employed tautological reasoning to affirm: "Contrary to appellant's argument, we believe the jury could have unanimously found appellant committed prior violent felonies used by the state in showing an aggravating circumstance, but at the same time, some jurors may not have considered those prior felonies a significant history of prior criminal activity." The Court did not discuss the illogic of an matter which some members of the jury found not to be significant, but which provides the sole basis for the sentence of death.

Arkansas has a three question weighing process, to which affirmative answers to all three mandate a death sentence. Ark. Code Ann. 5-4-603, formerly Ark. Code Ann. 41-1302. The jury must unanimously find that (i) at least one aggravating circumstance exists (ii) that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt and (iii) that the aggravating circumstances justify death beyond a reasonable doubt.

Nothing was presented to the jury specifically telling it that it could consider non-unanimous mitigating circumstances in the weighing process; to the contrary, the implication of the verdict forms is that unanimity is required, thus violating *Mills v. Maryland*, 486 U.S. 357 (1988), and *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990).

Assuming, *arguendo*, that Arkansas complies with the non-unanimous mitigating circumstance requirement enunciated in *Mills* and *McKoy*, a sentence based upon these contradictory findings must fall before the Eighth Amendment reliability requirement. The juror or jurors who found that the sole aggravating circumstance was not "significant" could not have answered logically the inquiries whether aggravating outweighed mitigating beyond a reasonable doubt and whether it justified a death sentence beyond a reasonable doubt, making the death verdict unreliable. Moreover, if the jury did not consider non-unanimous mitigating circumstances, the death verdict is unreliable because the jury could not circumstances that would have affected the weighing.

Reliability of the sentencing determination is the hallmark of this Court's capital jurisprudence. E.g. *Furman v. Georgia*, 408 U.S. 238 (1972). *Eddings v. Oklahoma*, 454 U.S. 104 (1982). *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989). Ambiguity in jury instructions is not tolerated. *Mills*, supra. Certainly, this Court should require that a death

sentence be based upon an aggravating circumstance not contradicted by other findings.

This Court should grant certiorari and hold that contradictory findings bar application of the death penalty.

CONCLUSION

Petitioner respectfully prays that the Petition for Writ of Certiorari be granted, the matter set for oral argument if necessary and the holding of the Arkansas Supreme Court reversed.

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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari to the Hon. Jack Gillean, Assistant Attorney General, Tower Building, 4th and Center Streets, Little Rock, Ark. 72201 this 21 day of May, 1990.

JEFFREY M. ROSENZWEIG

300 Ark. 360

William Frank PARKER, Appellant,

v.

STATE of Arkansas, Appellee.

No. CR 88-95.

Supreme Court of Arkansas.

Nov. 6, 1989.

Defendant was convicted of two counts of capital felony-murder, two counts of attempted first-degree murder, two counts of burglary, and one count of kidnapping and of attempted capital murder by a jury in the Benton County Circuit Court, and he appealed. The Supreme Court, 292 Ark. 421, 731 S.W.2d 756, reversed in part and affirmed in part. On retrial, defendant was again convicted of capital murder and given the death penalty in the Circuit Court, Benton County, W.H. Enfield, Jr., J. Defendant appealed. The Supreme Court, Glaze, J., held that: (1) the prosecutor's error in charging and trying defendant under the wrong provision of capital murder statute did not bar retrial under the right statutory provision; (2) evidence of other crimes which defendant committed after murdering victims was admissible; and (3) defendant was not prejudiced by the placement of a plexiglass screen around the witness stand during the trial.

Affirmed.

1. Criminal Law ⇐190

Trial error, as distinguished from evidentiary insufficiency, does not bar retrial under double jeopardy; trial error does not constitute a decision to the effect that government has failed to prove its case and implies nothing with respect to guilt or innocence. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐190

Prosecutor's trial error in charging and trying defendant under the wrong provision of capital murder statute did not bar retrial under the correct capital murder provision of statute; double jeopardy did not apply since sufficient evidence existed to prove defendant committed capital murder if charged and convicted under the correct law. A.C.A. § 5-10-101(a)(4); U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐369.2(8), 372(4)

Evidence that defendant kidnapped his former wife and shot at her and policeman after defendant had killed former wife's parents was admissible in prosecution for murder of parents to show defendant planned to kill entire family of former wife and because entire sequence of events was such an inseparable whole that the State was entitled to prove the entire criminal episode. Rules of Evid., Rule 404(b).

4. Criminal Law ⇐1166(1)

Denial to defendant of assistance of psychiatrist in preparing his defense was not prejudicial error because defendant made no effort to offer a sanity defense at guilt phase of capital murder trial, and defendant was permitted to offer considerable psychiatric testimony bearing on mitigating circumstances through psychiatrist employed with Department of Correction

5. Criminal Law ⇐1169.1(3)

Permitting prosecutor to ask officer whether defendant knew victims were dead was not reversible error; no substantial right was shown to have been affected by the question.

6. Criminal Law ⇐633(1)

Defendant was not prejudiced by placement of plexiglass screen around witness stand during entire trial where defendant was acting as his own attorney, and screen separated him from witnesses who were the objects of defendant's prior violence, and each juror that was voir dired on subject stated that screen would have no effect on deliberations.

7. Homicide ⇐358(3)

Jury could have unanimously found that defendant committed prior violent felonies used by the State in showing an aggravating circumstance during penalty phase of capital murder prosecution, but at the same time, some jurors may not have considered those prior felonies a significant

history of prior criminal activity; therefore, there were no conflicting findings.

8. Homicide ⇐357(5)

Evidence in penalty phase of homicide trial was sufficient to prove aggravating circumstance that defendant had previously committed another felony involving the use or threat of violence to another person; ex-wife testified that defendant had thrown a knife at her and also pointed a gun at her. A.C.A. §§ 5-4-604(3), 5-13-204, 5-13-301(a)(1).

Howard L. Slinkard, James M. Luffman, Rogers, for appellant.

Jack Gillean, Asst. Atty. Gen., Little Rock, for appellee.

GLAZE, Justice.

This is the second time the *Parker* case has been before this court. On November 12, 1985, Parker was convicted of two counts of capital felony murder, two counts of attempted first degree murder, two counts of burglary, kidnapping and attempted capital murder. He received the death penalty for two counts of capital felony murder for causing the deaths of James and Sandra Warren in the course and furtherance of a burglary. This court reversed the capital murder convictions finding that the Warrens' murders were not caused in the course of or furtherance of a burglary, but that Parker went into the Warrens' home for one purpose—to murder them. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987). Only the capital murder convictions were reversed, the other convictions were affirmed, and the capital murder convictions were severed.

On retrial, the appellant was charged pursuant to Ark.Code Ann. § 5-10-101(a)(4) (Supp.1987)—a person commits capital murder if with premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode. Acting pro se with the assistance of two attorneys present at trial, the appellant was again convicted of capital murder and given the death penalty. The appellant argues eight points for reversal. We find no merit in any of them, therefore we affirm.

Appellant first argues that our reversal of his first capital felony charge amounted to a finding that the prosecution failed to prove an essential element of the offense, viz., that the deaths occurred in the course of a burglary. As a consequence, he claims that, under the rationale of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), the double jeopardy clause precluded a second trial because the conviction was effectively reversed based upon the state's failure to produce sufficient evidence to sustain a guilty verdict.

[1, 2] The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks*, 437 U.S. 1, 98 S.Ct. 2141. However, there has been a distinction made between trial error and evidentiary insufficiency; trial error does not bar retrial under double jeopardy. *Id.* Appellant here mistakes evidentiary insufficiency with trial error. *See Sellers v. State*, 300 Ark. 280, 778 S.W.2d 603 (1989); *see also Montana v. Hall*, 481 U.S. 400 (1987). Trial error does not constitute a decision to the effect that the government has failed to prove its case and implies nothing with respect to guilt or innocence of the defendant. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984) (quoting *Burks v. United States*, 437 U.S. at 15, 98 S.Ct. at 21). Here, the trial error was in charging and trying Parker under the wrong capital murder provision. In the first *Parker* case, we stated that Parker could have been charged under Ark.Code Ann. § 5-10-101(a)(4)—the capital murder provision with which the state charged and convicted him at his second trial. When holding Parker had been convicted under an improper provision, we never suggested insufficient evidence existed to prove he committed capital murder if charged and convicted under the correct law.

At the second trial, appellant was correctly charged with the premeditated and deliberated purpose of causing the death of any person, he causes the death of two or more persons in the course of the same criminal episode. In our earlier *Parker* decision, we set out the facts surrounding the murders committed by the appellant. Suffice it to say, the state proved appellant shot at Cindy Warren but missed. Then, he chased Cindy's father into the Warren house where appellant shot and killed Cindy's parents, Mr. Warren and his wife, Sandra. In sum, the state at the second trial corrected its error by charging and convicting the appellant under capital murder provision § 5-10-101(a)(4), and the evidence was unquestionably sufficient to sustain the jury's guilty verdict under that charge.

[3] In his second issue, appellant urges the trial court erred in allowing the state to refer to events which occurred after the murders of Mr. Warren and his wife. Immediately after killing the Warrens, appellant located his former wife, Pam Warren, at her residence, kidnapped her and later shot her and a policeman at the police station where he kept Pam hostage. Appellant was convicted of these crimes committed subsequent to the killing of the Warrens and those convictions were affirmed in the first *Parker* appeal. At the second trial, appellant argued that those subsequent events (crimes) should have been excluded under A.R.E. Rules 403 and 404(b). The trial court admitted the state's evidence, but in doing so, admonished the jury that it could consider the evidence only for determining whether "the appellant had a state of mind sufficient to constitute the crime with which he was charged," *viz.*, the capital murders of the Warrens. The trial court was correct.

Rule 404(b) provides that the evidence of other crimes, wrongs, or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the present case, the theory of the state's case was that the appellant planned to kill the entire Warren family. The state developed its case to show the appellant's intent to kill Mr. and Mrs. Warren was precipitated because of his domestic troubles with the Warren's daughter, Pam. The record reveals appellant had married Pam and the relationship was beset with troubles related to his involvement in drugs. The state showed that Pam had divorced the appellant, and as a consequence, the appellant ended up terrorizing not only Pam but her sister, Cindy, and her parents, who had favored Pam's separation from the appellant. The state's evidence painted a picture of a series of terroristic acts and threats towards each member of the Warren family. Immediately after the appellant killed Mr. and Mrs. Warren and his attempt to do the same to Cindy, the appellant went to where Pam lived and forced her to go with him to the police station, where he shot a police officer. The testimony reveals he held Pam as a hostage and requested that Cindy Warren be brought to him. During this time, he had also shot Pam in the abdomen and told her that he had killed her parents. When he was arrested, the appellant possessed the same automatic gun used in his shooting of the Warrens and he wore the same army camouflage or combat clothing he had changed into before going to the Warrens to kill them.

These events following the killing of the Warrens were extremely probative in that they revealed not only that the appellant killed the Warrens but also that he had planned to kill the entire Warren family and that he induced the hostage situation in an effort to get both Pam and Cindy at the police station so he could consummate his plan. We also believe the events following the Warrens' killings were admissible because the entire sequence of events was such an inseparable whole that the state was entitled to prove the entire criminal episode. *See Thomas v. State*, 273 Ark. 50, 615 S.W.2d 361 (1981); *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977); *Harris v. State*, 239 Ark. 771, 394 S.W.2d 135 (1965).

[4] In his third point for reversal, appellant cites *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) and argues he was denied the assistance of a

psychiatrist in preparing his defense.[1] In *Ake*, the Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense. Appellant made no such demonstration in the present case.

At his first trial, appellant raised mental disease or defect as an affirmative defense, but he failed to do so at his second trial. On a number of occasions, the appellant, acting pro se, stated that he had no intention of raising a sanity defense but that he thought "duress is a form of mental illness." He later added, "Is not duress a mitigating circumstance, under the influence?" While the record reads in a somewhat disjointed fashion (largely due to the manner in which the appellant represented himself), it is clear that the appellant intended to raise his mental condition as a mitigating factor at the penalty phase of his trial; towards that end, he presented Dr. Oglesby, a psychiatrist with the Department of Correction, as a witness.[2] Consistent with his earlier declaration that he did not intend to raise mental disease or defect as a defense during the guilt phase of his trial, he called Dr. Oglesby as a witness only at the penalty phase. From our careful examination of the record, we confirm the trial court's finding that the appellant failed to raise the sanity defense or to show that his sanity at the time of the offense was a significant factor at trial. Because appellant made no effort to offer a sanity defense at the guilt phase of the trial and he was permitted to offer considerable psychiatric testimony through Dr. Oglesby bearing on mitigating circumstances, appellant simply fails to show any prejudicial error.

[5] Appellant's next issue is wholly without merit. He argues the trial court erred in permitting the prosecutor to ask the following question of Officer Sydoriak:

> Q When, when you told him that the Warrens were in the hospital, did that seem to fool him in any way?
>
> A No, sir.
>
> Q Did he at any time indicate any, I guess indicate to you that he was unsure as to whether the Warrens were actually dead or alive?
>
> A No, sir. He was *sure* that they were dead.
>
> Q *Confident of that*?
>
> A Yes, sir. (Emphasis added.)

Appellant characterizes the foregoing question as a leading one which was designed to inflame the jury's passion. He offers no explanation concerning how he was prejudiced by the question, nor do we read the question as a leading one. Instead, the question, "Confident of that?" appears to be nothing more than a reaffirmation of the officer's prior remark that "He [appellant] was sure that they were dead." In any event, reversible error may not be predicated upon a ruling admitting evidence unless a substantial right is affected. A.R.E. Rule 103(a); *Daniels v. State*, 293 Ark. 422, 739 S.W.2d 135 (1987). Clearly, no substantial right was shown to have been affected here even if we were to hold that a proper objection had been offered by the appellant.

[6] Appellant's fifth issue suggests that he was prejudiced by the placement of a plexiglass screen around the witness stand during the entire trial. Presumably, the screen was used because the appellant was acting as his own attorney, and it separated him from the witnesses during his examination of them. Appellant cites A.R.Cr.P. Rule 33.1 which provides that defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. *See also Johnson v. State*, 261 Ark. 183, 546 S.W.2d 719 (1977) (where this court held that it cannot presume prejudice from the fact that the defendant was brought into the courtroom in handcuffs). Of course, Rule 33.1 concerns physical restraints of a defendant, such as handcuffs; here the screen was not used to restrain the appellant but merely to protect the witnesses. Two state witnesses, Pam and Cindy Warren, were the objects of the appellant's prior violence, and in acting as his own attorney, appellant was placed in a capacity or role that he could approach witnesses. No doubt, the trial judge's concern for these two witnesses' safety was legitimate. We find nothing in the record that reflects the appellant was prejudiced by the screen device, and in fact, all of the jurors that were voir dired on the subject stated that the screen would have no effect on his or her deliberations.

Regarding appellant's sixth point, he acknowledges that this court has held the state, in proving aggravating circumstances, can proceed under Ark.Code Ann. § 5-4-604(3) (1987) by establishing certain prior felonies without showing those felonies have been reduced to convictions. *See Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983). He urges that we overrule the *Miller* decision and hold § 5-4-604(3) unconstitutional. The appellant, however, made no constitutional claim before the trial court, and offers no compelling reason why we should overrule our holding in *Miller* or hold § 5-4-604(3) unconstitutional.

[7] Appellant next contends the jury returned conflicting findings in the penalty phase of the trial. In this connection, the jury unanimously found the appellant committed another felony, an element of which was the use of threat of violence to another person. However, in addition, some of the jurors found that the appellant had no significant history of prior criminal activity. Appellant concedes that it is not impossible to reconcile the jury's two findings but that to do so is speculation. Appellant suggests the conflict exists because the commission of a felony involving force or violence, by definition, is a significant criminal activity. We disagree.

In *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), we stated we will not substitute our judgment for the judgment of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory circumstance. Contrary to appellant's argument, we believe the jury could have unanimously found appellant committed prior violent felonies used by the state in showing an aggravating circumstance, but at the same time, some jurors may not have considered those prior felonies a significant history of prior criminal activity.

[8] Finally, appellant argues the state failed to prove the aggravating circumstance that he had previously committed another felony involving the use or threat of violence to another person. *See* Ark. Code Ann. § 5-4-604(3) (1987). The state alleged appellant had committed aggravated assault and terroristic threatening. *See* Ark.Code Ann. §§ 5-13-204, 5-13-301(a)(1) (1987). We have held that the same degree of proof is not required to sustain a jury finding that an aggravating circumstance exists, as would be required to sustain a conviction. *Miller*, 269 Ark. 341, 605 S.W.2d 430. Regarding the state's allegation of aggravating evidence, Pam Warren testified that on April 27, 1984, the appellant threw a knife at her that broke a tile and landed only six inches above her head. Clearly, the knife throwing incident created a substantial danger of death or serious injury. Later that same evening, the appellant stood in the kitchen doorway pointing a gun and laughing at Pam for four or five minutes. She testified that she was terrified, and called the police. We have no hesitancy in concluding the evidence was sufficient to prove the aggravating circumstance required under § 5-4-604(3).

In accordance with Ark.Sup.Ct.R. 11(f), we have reviewed all objections decided adversely to the appellant, and we find no

1. In so arguing, the appellant points out, and the state concedes, that the state hospital's evaluation of the appellant was made without the use of a psychiatrist.

2. Apparently, prior to trial, the trial court denied his request for appointment of a psychiatrist to assist him in developing issues relating to mitigating circumstances. Nevertheless, appellant was later given ample opportunity to contact Dr. Oglesby prior to trial and call him as a witness at trial.

error. For the reasons stated above, we affirm.

300 Ark. 369
Vernon ROSS, Appellant,
v.
STATE of Arkansas, Appellee.
No. CR 89-63.
Supreme Court of Arkansas.
Nov. 6, 1989.

Defendant was convicted in the Circuit Court, Craighead County. David Burnett, J., of arson, burglary, and theft of property. On appeal, the Supreme Court, Glaze, J., held that: (1) officers had probable cause to arrest defendant, and (2) evidence was sufficient to support conviction.

Affirmed.

Dudley, J., dissented and filed opinion.

1. Arrest ⇐63.4(9)

Officers had probable cause to make warrantless arrest of arson suspect, based upon informant's corroborated statement that suspect had admitted to committing crime. U.S.C.A. Const.Amend. 4.

2. Arrest ⇐68.5(7)

Officers' entry into arson suspect's motel room to effect warrantless arrest was proper; suspect opened door himself, though dressed only in a sheet, and there was testimony that suspect invited officers into the room. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐984.6(1)

Arson defendant was not entitled to trial bifurcated into guilt and sentencing phases.

4. Criminal Law ⇐829(1)

Even if defendant's proffered instructions were correct, it was not error for court to refuse to give them if other instructions given covered issue.

5. Arson ⇐37(1)

Arson conviction was sufficiently supported by expert testimony that several fires were intentionally set in building and by evidence of garden hose used to siphon gasoline found in accomplice's vehicle. A.C.A. § 5-38-301(a)(4), (b).

6. Criminal Law ⇐478(1)

Fire chief was qualified to testify as expert on point of origin and cause of fire, though he was not certified in cause and origin investigation, in that he had 51 years experience in fire fighting and had attended courses dealing with arson and determination of cause and origin of fires.

7. Criminal Law ⇐404.30

Evidence is admissible, notwithstanding alleged defects in chain of custody, if trial judge, in his discretion, is satisfied that evidence presented is genuine and, in reasonable probability, has not been tampered with.

8. Criminal Law ⇐1169.2(2)

Any error in allowing school superintendent to testify as to total damages from fire was harmless, for purpose of determining whether arson defendant caused at least $100,000 in damages and thus committed Class Y felony, where superintendent's unobjected to testimony on cross-examination regarding cost per volume of replacing destroyed library was itself sufficient to exceed $100,000 amount. A.C.A. § 5-38-301(b).

9. Criminal Law ⇐453(1)

High school football coach's knowledge of value of equipment stolen was sufficient to allow him to testify as to its value for purpose of establishing statutory amount in theft of property prosecution. A.C.A. § 5-36-103(b)(2)(A); Rules of Evid., Rule 701.

10. Witnesses ⇐392(1)

Arson defendant who testified that he did not care anything about former girl friend, who testified against him, could

292 Ark. 421
William Frank PARKER, Appellant,
v.
STATE of Arkansas, Appellee.
No. CR 86-91.
Supreme Court of Arkansas.
June 15, 1987.

Defendant was convicted of two counts of capital felony-murder, two counts of attempted first-degree murder, two counts of burglary, and one count of kidnapping and of attempted capital murder by a jury in the Benton County Circuit Court, William H. Enfield, J., and he appealed. The Supreme Court, Holt, C.J., held that: (1) killings forming basis of defendant's capital felony conviction were not committed "in the course and in furtherance of" burglary as required for capital felony-murder; (2) action taken as part of same course of behavior was not previously committed felony which could be used as aggravating circumstance; and (3) photographs of murder victims while alive were not admissible.

Reversed in part and affirmed in part.

Hickman, J., filed concurring opinion.

Glaze, J., filed dissenting opinion in which Hays, J., joined.

1. Homicide ⇐18(1)

Defendant who killed victims after entering their house could not be convicted of capital felony-murder on ground that killings were "in the course and in furtherance of" a burglary where entry into house was for only one purpose, i.e. to commit murders. Ark.Stats. §§ 41-1501(1)(a), 41-2002.

2. Homicide ⇐18(3)

In order to constitute capital felony-murder, murder had to be committed in the course of and in furtherance of burglary; felony-murder doctrine did not apply where burglary was no more than one step toward commission of murder but did not have an independent objective which the murder facilitated. Ark.Stats. §§ 41-1501(1)(a), 41-2002.

3. Homicide ⇐354

Defendant's act of shooting at daughter of murder victims was so closely connected in both time and place to killings of her parents that it did not constitute aggravating circumstance that defendant had previously demonstrated character for violent crimes or history for committing such crimes. Ark.Stats. § 41-1303(3).

4. Criminal Law ⇐589(2)

Failure to grant continuance so that defendant could be reevaluated by state hospital in support of his insanity defense was not abuse of discretion where only evidence of defendant's alleged head trauma was his own statements concerning injury that were contained in Veterans Administration hospital record and his statements to his ex-wife, but there was no evidence of any mental problems suffered as result of head injury.

5. Criminal Law ⇐627.7(3)

State's alleged failure to disclose to defendant statements made by defense expert witness was not error where expert was called to testify by defense, rather than State, and defendant failed to show how any information acquired by State pursuant to subpoena prejudiced his defense. Rules Crim.Proc., Rule 17.1(b)(i).

6. Criminal Law ⇐627.5(1)

Denial of defendant's motion to subpoena witnesses did not violate his equal discovery rights where only witness subpoenaed by State was called by defense to testify, rather than by prosecution, and there was no indication that prosecutor abused subpoena power or that any testimony was hidden from defendant. Ark. Stats. § 43-801.

7. Criminal Law ⇐627.8(2)

Denial of defendant's motion for continuance and refusal to suppress testimony because of State's alleged failure to timely disclose certain statements of witnesses to the defense did not prejudice defendant, where statements were provided before trial to defendant's expert witness, who said they did not affect his opinion, and same testimony that witness is provided, about

defendant being distraught over failure of his marriage, was provided by other witnesses. Rules Crim.Proc., Rule 17.1(a)(ii).

8. Criminal Law ⇐620(6)

Failure to grant defendant's motion for severance of capital murder charges from other offenses was not abuse of discretion where crimes charged constituted single criminal episode. Rules Crim.Proc., Rules 21.1, 22.2(a), 22.3(b)(i).

9. Costs ⇐302.4

Defendant's right to psychiatric examination was adequately protected by examination at state hospital which, as an institution, had no part in criminal prosecution and thus denial of his motion for funds for private psychiatrist was not improper, especially given defendant's ability to afford services of clinical psychologist.

10. Criminal Law ⇐1169.1(10)

Prejudicial nature of photographs of murder victims, which were autopsy pictures showing corpses with blood cleaned away from bullet wounds, did not so substantially outweigh their value in showing repeated and accurate shooting from close range while victims were defenseless, as to make their admission reversible error.

11. Criminal Law ⇐438(2)

Photographs of murder victims while alive had no probative value in murder case and were not admissible.

12. Criminal Law ⇐1166(10.10)

Trial court's alleged failure to require prosecutor to provide defendant with previous statements made by police officer who testified for State was not prejudicial where defendant failed to indicate what statements officer had previously made to which defendant was not given access. Ark.Stats. § 43-2011.3.

13. Criminal Law ⇐1171.1(3)

Although trial court improperly permitted prosecutor to address jury to correct impression that State had not given defense adequate time to review statements prosecution had in its possession, defendant failed to show error was prejudicial.

14. Criminal Law ⇐749

Trial court's failure to exercise discretion in imposing sentences recommended by jury was not improper. Ark.Stats. §§ 41-802, 41-903.

15. Homicide ⇐351

Capital murder statute was not unconstitutional on ground that it had been applied almost exclusively to males.

W.H. Taylor, Fayetteville, James G. Lingle, Rogers, for appellant.

Steve Clark, Atty. Gen. by Jack Gillean, Asst. Atty. Gen., Little Rock, for appellee.

HOLT, Chief Justice.

William Frank Parker was convicted of two counts of capital felony murder for which he was sentenced to death; two counts of attempted first degree murder (thirty years imprisonment and $15,000 fine for each); two counts of burglary (twenty years imprisonment and $15,000 fine for each); kidnapping (life imprisonment and $15,000); and attempted capital murder (thirty years imprisonment and $15,000). Parker's capital felony murder convictions were for causing the deaths of James and Sandra Warren in the course of and in furtherance of a burglary. The burglary, as proved by the state, was the entry of the Warrens' home for the purpose of committing therein the murders of the Warrens. The capital felony murder convictions must be reversed because the Warrens' deaths were not caused "in the course of and in furtherance of" a burglary as required by Ark.Stat.Ann. § 41-1501(1)(a) (Repl.1977), and because the trial court erred in submitting evidence under Ark.Stat.Ann. § 41-1303(3) (Repl.1977) regarding previously committed felonies as an aggravating circumstance at the penalty phase of the appellant's trial. Parker's remaining arguments contain no reversible error, thus we affirm each of his other convictions.

The relevant facts are basically undisputed as Parker's primary defenses at trial related to his mental capacity at the time of the events. Parker was divorced from Pam Warren. Pam's father, James Warren, and her sister, Cindy Warren, were getting into Mr. Warren's truck in front of their house on November 5, 1984, when they saw Parker approaching the truck with a gun. Cindy got on the floor of the truck, from where she heard shots being fired. Cindy then got out of the truck and attempted to spray mace into Parker's face. Parker fired one or two shots at Cindy, not hitting her, and then chased Mr. Warren into the house. Mr. Warren and his wife Sandra were later found in the house where they had been shot to death by Parker. In the events that followed that same day, Parker kidnapped and shot his ex-wife, Pam Warren, and shot a police officer three times in a shootout at the Rogers Police Department.

1. CAPITAL FELONY MURDER

Parker maintains the trial court erred in not directing a verdict in his favor on the capital murder charges for killing the Warrens. Parker was charged under Ark.Stat.Ann. § 41-1501(1)(a), which provides:

> A person commits capital murder if: ... he attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and *in the course of and in furtherance of the felony*, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; ... (emphasis added)

[1] An analysis of this statute leads us to the conclusion that it cannot be read to encompass the facts of this case. The state's proof showed that Parker followed Mr. Warren into the house for only one purpose—to commit the murders of the Warrens. The entry was a burglary because Parker unlawfully entered an occupiable structure with the intent to commit those punishable offenses. Ark.Stat.Ann. § 41-2002 (Repl.1977). The killings were obviously a form of criminal homicide of some degree, but they were not "in the course of and in furtherance of" the burglary as required to be capital felony murder. Parker could have been charged under subsection (1)(c) of § 41-1501 for causing the death of two or more persons in the course of the same criminal episode. Instead, the prosecutor elected to proceed under subsection (1)(a), which was wrong. We must reverse.

Relying on *Blango v. United States*, 373 A.2d 885 (D.C.1977), the state argues that the societal interests served by the burglary statute justify its use to support capital felony murder. In that case, *Blango* committed burglary by entering an "occupied dwelling" with the intent to commit assault on the victim. The court reasoned that the burglary violated the "societal interest in protecting occupied dwellings due not only to the inherent danger to occupants during the commission of such an offense, but also to the value society places on the home." The D.C. court stated that the crime was complete upon entry, "and is a separate and distinct act from the succeeding killing, yet may be deemed to be a continuing offense for purposes of the felony murder statute." *Blango* reasoned that the felony murder statute has the distinct societal interest of protecting the security of the person and the value of human life by punishing nonpurposeful killings by implying premeditation and deliberation from the commission of the burglary. *Blango* quoted *People v. Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973) in support of its rationale:

> It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street. Where, as here, the criminal act underlying the burglary is an assault with a dangerous weapon, the likelihood that the assault will culminate in a homicide is significantly increased by the situs of the assault.

Unlike the case before us, in *Miller* the defendant was convicted of murdering a person who came to the aid of the first victim, whose home the defendant had entered to commit the assault. *Blango* and *Miller's* distinction between whether a murder is committed in an occupied dwelling as opposed to outdoors may or may not be a valid reason for making it unnecessary to prove the intent ordinarily required for a capital or first degree murder conviction under the applicable statutes in those cases. However, when viewing the language of our own statutes such a distinction does not exist. For the phrase "in the course of and in furtherance of the felony" to have any meaning, the burglary must have an independent objective which the murder facilitates. In this instance, the burglary and murder have the same objective. That objective, the intent to kill, is what makes the underlying act of entry into the home a burglary. The burglary was actually no more than one step toward the commission of the murder and was not to facilitate the murder.

[2] Simply put, the state has not advanced any convincing argument as to how the murder committed after the burglary could be in the course of and in furtherance of the burglary, both of which are elements required by our statutes. "If we can, we give legislation a construction to affect legislative intent ... However, this is a criminal statute which must be strictly construed with doubt being resolved in favor of the accused." *Knapp v. State*, 283 Ark. 346, 676 S.W.2d 729 (1984). In strictly construing our statutes, as we must do, it is apparent that in order to constitute capital felony murder, the murder must be in the *course of*, and in *furtherance* of the burglary, which is not the case before us.

2. PREVIOUSLY COMMITTED FELONIES

Appellant argues that the trial court erred in submitting an instruction on previously committed felonies under § 41-1303(3) as an aggravating circumstance at the penalty phase of his trial. His argument is that there was no evidence that Parker "previously" committed another felony, other than shooting at Cindy Warren, which was contemporaneous with the killings of James and Sandra Warren. We must agree.

Section 41-1303(3) provides as follows:

> Aggravating Circumstances—Aggravating circumstances shall be limited to the following:
>
> . . . . .
>
> (3) the person previously committed another felony, an element of which was the use or threat of violence to another person or created a substantial risk of death or serious physical injury to another person.

In *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), this court addressed the question of what is meant by a previously committed offense under this statute. In *Hill* we explained that the reason for section (3) is to allow the state to show that the defendant has a character for violent crimes or a history of committing such crimes. Since there are other avenues by which the state can prove crimes immediately connected with the principal crime, our conclusion was that this section applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. In this instance, the shooting at Cindy Warren was so closely connected in both time and place that it did not present a portrait of the defendant as having previously demonstrated a character for violent crimes or a history for committing such crimes.

[3] Because the trial court erred in submitting this case under our felony murder statute, and in instructing the jury on previously committed felonies, we reverse.

We find no merit in the issues raised by Parker for reversal of the other convictions. In addition to those issues, we will address the questions which may arise on retrial of the capital murder charges.

3. CONTINUANCE FOR RECOMMITMENT TO STATE HOSPITAL

Parker argues that the trial court should have granted his motion for a continuance so that he could be reevaluated by the state hospital in support of his insanity defense. The trial court granted Parker's first request for a thirty-day commitment to the state hospital for a mental examination on November 15, 1984. The report from the state hospital, dated January 31, 1985, concluded that Parker was capable of assisting in his defense and that at the time of the commission of the offenses he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

On July 19, 1985, Parker filed a motion to be recommitted to the state hospital for an additional evaluation. An amended motion was filed on August 1, 1985, with a letter from Dr. David Pritchard, the forensic psychologist for the Arkansas Department of Human Services who conducted Parker's first examination. Dr. Pritchard said in the letter that he felt it was "professionally advisable to return the defendant to the Arkansas State Hospital for additional neurological and neuropsychological evaluations." The reason for the suggestion was that Dr. Pritchard had been made aware of a statement by Parker found in the Veterans' Administration Hospital records from 1982 in which he gave a history of severe head trauma. Dr. Pritchard stated in the letter that Parker should be returned to the hospital only after the hospital had received the army records which document the head trauma. Parker's counsel had been unable to obtain the records from the St. Louis Army Records Section.

On September 20, 1985, Parker filed a motion for a continuance stating that the medical records pertaining to his head injury could not be obtained, that additional efforts to obtain the records were being made, and that the continuance was necessary to permit him to obtain the records. The trial court denied the motion and the trial began on October 28, 1985.

Parker contends that he was unable to adequately and completely present defenses and mitigating factors based on his mental condition without the neuropsychological evaluation to determine the effect of the head injury. He argues that a defendant should not be forced to go to trial in such a serious case as this without the opportunity to present evaluations from medical personnel who have the benefit of his complete medical history, including prior injuries. Parker states that his statement concerning the prior injury is given credibility because it was found in hospital records from more than two years before the murder. It was corroborated by testimony of Pam Warren, who testified at trial that Parker had told her how he received an injury when he was hit on the head with a pipe while working as a disc jockey at an army base.

Arkansas R.Crim.P. 27.3 states:

> The court shall grant a continuance only upon the showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

Parker was tried just one week short of a year from the date of the crimes.

Whether to grant a continuance is addressed to the sound discretion of the trial court and this court does not reverse unless that discretion has been abused. *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186 (1984). The burden is on the appellant to show that there has been an abuse of the court's discretion in denying the continuance. *Cotton v. State*, 265 Ark. 375, 578 S.W.2d 235 (1979). There is no error in the denial of a motion for a continuance to obtain evidence that is not material and not relevant. *Worley v. State*, 259 Ark. 433, 533 S.W.2d 502 (1976). In *Worley*, we said the trial court was justified in denying a continuance requested by the appellant in order to secure documentary evidence, where he only verbally assured the court the documents would be forthcoming and it appeared the records might not be material or relevant.

[4] The only evidence of Parker's head trauma was his own statements concerning the injury that were contained in the Veterans' Administration Hospital records and his statements to Pam Warren. Warren also testified that Parker never claimed to

have any lasting effects from the injury. Parker's attorneys were never able to produce any documentation of his injury, even though they knew about it as early as July, 1985, when the additional evaluation was requested. The record does not establish whether any documentation could have ever been obtained, and Dr. Pritchard's letter stated that the reevaluation should occur only after the records were received. There is also no evidence of any mental problems suffered as a result of the head injury. For these reasons, the trial court did not abuse its discretion in denying the motion for a continuance.

4. DISCOVERY

Parker's next two arguments for reversal are that the trial court erred by not compelling discovery of statements taken by the prosecutor pursuant to his subpoena power, and that the trial court erred in not granting his motion to compel the circuit clerk to issue discovery subpoenas so that he would have the same subpoena power as the prosecutor. We rejected these same arguments in *Alford v. State*, 291 Ark. 248, 724 S.W.2d 151 (1987).

[5] In regard to the first of these issues, Parker contends, as did Alford, that Ark.R.Crim.P. 17.1(b)(i), which requires the prosecutor to disclose to the defendant the "substance of any relevant grand jury testimony," should be extended to compel the prosecutor to furnish statements acquired by subpoena. Parker bases this contention on *Taylor v. State*, 220 Ark. 953, 251 S.W.2d 588 (1952), which said that prosecuting attorneys have in a sense replaced grand juries and are subject to the same rules. In *Alford*, we said that the prosecuting attorney did not have to furnish the defendant with statements taken pursuant to a subpoena, but only must disclose to defense counsel any material information within the prosecutor's knowledge, possession or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce any resulting punishment. Ark.R.Crim.P. 17.1(d). The statement sought by Parker was made by Parker's expert witness, Dr. Phillip Barling. Dr. Barling was called to testify by Parker, rather than by the state, and Parker has not shown how any information acquired by the state prejudiced his defense. Thus, there was no error.

We also held in *Alford* that the appellant was not denied due process when he was not allowed equal discovery rights to those given the state in Ark.Stat.Ann. § 43-801 (Repl.1977). That statute authorizes prosecutors to issue subpoenas and administer oaths in all criminal matters they are investigating. Like Alford, Parker contends the trial court's denial of his motion to subpoena witnesses is violative of the United States Supreme Court's statement on the issue of equal discovery rights in *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). In *Alford*, we said:

> The *Wardius* decision does not suggest that the due process clause requires states to adopt discovery procedures in criminal case, but rather it held that, where a state imposes discovery against a defendant, equivalent rights must be given to a defendant. *Hoggard v. State*, 277 Ark. 117, 640 S.W.2d 102 (1982). The record before us fails to reflect that the State, by use of its statutory authority to subpoena witnesses, in any way abused that power in an effort to obtain witnesses against the appellant or to secrete their testimony from him before trial. Thus, we see no merit in appellant's argument.

[6] As in *Alford*, the only witness subpoenaed by the state was called by the defense to testify, rather than by the prosecution, and there is no indication of abuse by the prosecutor of the subpoena power or that any testimony was hidden from Parker. Accordingly, there was no prejudicial error.

Parker next argues that the trial court should have either granted his motion for a continuance or suppressed certain testimony because the state failed to timely disclose certain witnesses' statements to the defense. Parker argues that in response to pretrial motions for discovery, the prosecutor had assured him and the court that he was disclosing all of Parker's previous

statements the state had in compliance with Ark.R.Crim.P. 17.1(a)(ii). October 17, 1985, however, eleven days before trial, the state provided Parker with certain statements by witnesses relating what Parker had told them. Seven days before trial, the prosecutor gave the defense affidavits containing more statements Parker had allegedly made to third parties. Parker moved that all the statements be suppressed because they were provided too late for Parker to adequately defend against them or to have them analyzed by his expert witness. Only the testimony of Leta Lloyd, however, is urged as prejudicial by Parker. That testimony concerned statements by Parker about his marital difficulties that show how upset he was over his separation from Pam Warren. Parker argues he could have used these statements to support his contention that his divorce had affected his emotional state before the crimes were committed.

[7] The state argues that Parker's attorneys were able to interview Lloyd before the trial, the statements were provided before trial to the defense's expert witness who said it did not affect his opinion, and the same testimony Lloyd provided about Parker being distraught over the failure of his marriage was provided by other witnesses. The state's position is correct. Accordingly, the trial court did not abuse its discretion in denying the continuance and refusing to suppress the testimony, and Parker has shown no prejudice as a result of the ruling. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984).

5. SEVERANCE

Parker also contends that the trial court should have granted his motion for a severance of the capital murder charges from the other offenses. Two or more offenses may be joined when they (a) are of the same or similar character or (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ark.R.Crim.P. 21.1. If offenses are joined solely on the ground that they are of the same or similar character and are not part of a single scheme or plan, a defendant has the right to a severance. Ark.R.Crim.P. 22.2(a). The court shall also grant a severance if it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. Ark.R.Crim.P. 22.3(b)(i).

[8] It is clear that the crimes charged constituted a single criminal episode and "when a series of acts are connected that is enough to give the state a right to join them in a single information." *Ruiz v. State*, 278 Ark. 94, 617 S.W.2d 6 (1981). Parker maintains that the cumulative effect of the offenses was prejudicial and that the severance should have been granted in order to promote a fair determination of his guilt or innocence. Parker has offered no convincing argument that the trial court abused its discretion in determining that a severance was not appropriate to promote a fair determination of Parker's guilt or innocence, and we find no error.

6. FUNDS FOR PRIVATE PSYCHIATRIC EXAMINATION

[9] Parker next contends that the trial court should have granted his motion for funds for a private psychiatrist. In *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987), we held that the defendant's right to an examination under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) was adequately protected by the examination at the state hospital, an institution which has no part in the prosecution of criminals. In addition, Parker was able to afford the services of Dr. Barling, a clinical psychologist.

7. INFLAMMATORY PHOTOGRAPHS

Parker argues also that the trial court erred in admitting several photographs showing the Warrens' bodies at the scene and at the coroner's. Pictures of the blood-stained floor and a picture of the Warrens together while alive were also shown to the jury over Parker's objections.

Parker maintains that the probative value of these photographs was substantially outweighed by the danger of unfair preju-

dice because of their inflammatory nature and that the photographs were needlessly cumulative. A.R.E. Rule 403. The fact that photographs are inflammatory is not alone sufficient reason to exclude them. *Smith v. State*, 282 Ark. 585, 669 S.W.2d 201 (1984). Inflammatory pictures are "admissible in the discretion of the trial judge, if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony." *Perry v. State*, 255 Ark. 378, 500 S.W.2d 337 (1973). We have often held that a photograph is not inadmissible merely because it is cumulative, and that the defendant cannot admit the facts portrayed and thereby prevent the state from putting on its proof. *Rodgers v. State*, 261 Ark. 293, 547 S.W.2d 419 (1977). Even the most gruesome photographs have been held admissible when they related to proof of an element of the offense charged. *Perry, supra; Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980); *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979).

In *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986), we reversed the trial court when it needlessly allowed seven photographs of the victim's face and dislodged teeth, some of which showed the victim in a more inflammatory state because of the coroner's work on the victim. In *Berry*, the photographs had little relevance to the issues at the trial; depicted injuries inflicted by the appellant's accomplice; were needlessly repetitive; and were unusually inflammatory.

[10] The state argues that the photographs in this case were necessary to show the repeated and accurate shooting of the victims by Parker from close range and while the victims were defenseless. Parker's "extreme indifference to the value of human life" was an element of the capital murder charges. None of the photographs were unnecessarily gruesome, and the autopsy pictures merely showed the corpses with the blood cleaned away from the bullet wounds. Any prejudicial nature the photographs had did not so substantially outweigh the probative value as would mandate a reversal. We trust, however, that the trial court on retrial will carefully weigh the probative value of each photograph against its prejudicial nature, and not automatically accept every photograph the state has to offer, as we directed in *Berry*.

[11] The photograph of the victims while alive had little, if any, prejudicial effect, but Parker is correct in asserting that it also had no probative value, and it should not be admitted on retrial. *See Parker v. State*, 290 Ark. 158, 717 S.W.2d 800 (1986).

8. PREVIOUS STATEMENTS OF WITNESS

[12] Parker maintains that the trial court erred in not requiring the prosecutor to provide him with previous statements made by a police officer who testified for the state. Ark.Stat.Ann. § 43-2011.3 (Repl.1977). We are unable to determine what Parker is alleging as error, because after the request for the statements was made, the trial court agreed that Parker was entitled to whatever the officer had used to refresh his memory, and to any other statements he had previously given or signed, but that he thought Parker already had those statements. Parker's counsel responded that he did. There is nothing in Parker's argument indicating what statements the officer had previously made to which Parker was not given access. Therefore, he has not shown any prejudicial error.

9. PROSECUTOR'S ARGUMENT

Parker also contends that the trial court erred in allowing the prosecutor to address the jury in response to a juror's question. After Parker's attorney requested a recess to review a witness's previous statements provided by the prosecutor after the witness had testified, the juror asked why the statements were not provided earlier in order to save time. The prosecutor was allowed to tell the jury that the statements had been supplied to the defense on April 3, 1985, that the witness had testified in a

pretrial hearing, that a transcript of the hearing was available to the defense, and that other notes had been made available while the witness was testifying.

[13] Parker argues that this, in effect, made the prosecutor an unsworn witness, who was not subject to cross-examination. The prosecutor, however, did not address the jury on an issue pertaining to Parker's guilt or innocence, but only sought to correct the impression that the state had not given the defense adequate time to review the statements the prosecution had in its possession. The trial court was wrong in permitting the prosecutor to address the jury, however, Parker has not shown any prejudice as a result of the prosecutor's response to the juror's question, and we need not reverse. *Berna, supra.*

10. DISCRETION IN SENTENCING

[14] Parker alleges that the trial court failed to exercise its discretion in imposing the sentences recommended by the jury. The responsibility for sentencing was placed with the jury by Ark.Stat.Ann. § 41-802 (Repl.1977). Parker has apparently confused this situation with the rule that the judge must exercise discretion in determining whether sentences should run consecutively or concurrently. Ark.Stat. Ann. § 41-903 (Repl.1977); *Wing v. State*, 286 Ark. 494, 696 S.W.2d 311 (1985). No error was committed.

11. CONSTITUTIONALITY OF CAPITAL FELONY MURDER STATUTE

[15] Finally, Parker argues that our capital murder statute is unconstitutional in its application, because it has been applied almost exclusively to males. This argument was not raised at trial, and thus we are not required to address it on appeal. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). For purposes of the retrial, however, we note that we see no merit in the argument that our facially neutral statute, held constitutional in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), was passed with any discriminatory intent towards men.

12. SEVERANCE OF JUDGMENT

In *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986), we held that "[w]hen a judgment in a criminal case is correct as to one count, but erroneous as to another, as in this case, we have the power to sever the judgment, affirm the count on which the appellant was properly convicted, and reverse and grant a new trial as to the other." Accordingly, the capital murder convictions are reversed. Parker's other convictions are affirmed.

HICKMAN, J., concurs.

HAYS and GLAZE, JJ., dissent.

HICKMAN, Justice, concurring.

I concur and write merely to maintain my opposition to the decision in *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

GLAZE, Justice, dissenting.

I respectfully but vigorously disagree with the majority decision concerning its disposition and reversal of the capital felony murder conviction regarding appellant's killing of Sandra Warren. Although it can be said that the appellant entered the Warren's house to kill James Warren, the proof at the same time precludes that he entered the house with the intention to murder Sandra. Cindy Warren testified that the appellant saw her and her father, James, when they were departing James' truck in front of the Warren house. Appellant shot at Cindy and then his "attention automatically went to my father," as her father was running to the house.

I fail to see any logic in the majority's attempt to distinguish the instant case from either the holding in *People v. Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973), or *Blango v. United States*, 373 A.2d 885 (D.C.1977). As was true with the defendants in those cases, the appellant here entered an occupiable structure to commit a crime other than the one with which he was convicted. In this respect, appellant entered the Warren house with the ostensible purpose of killing James Warren—which the majority concedes was

a burglary because appellant entered an occupiable structure with the intent to commit an offense punishable by imprisonment. Ark.Stat.Ann. § 41-2002 (Repl. 1977). Again, as were the situations in *Miller* and *Blango*, appellant, while in the course and furtherance of committing this burglary (felony), murdered James' wife, Sandra—a second and distinct crime.

The rationale underlying the *Miller* and *Blango* decisions is that the legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street.

In the instant case, appellant's entry into the secluded and confined homestead of the Warrens in his pursuit and effort to kill James also enhanced greatly the prospects that he would kill anyone else trapped within those confines. I believe the rationale underlying our State's felony murder statute is sound, and the facts of this case implore its application, at least as to Sandra Warren.

I also disagree with our court's holding in *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), insofar as that decision interpreted Ark.Stat.Ann. § 41-1503(3) (Repl. 1977). In my view, this court placed a much too restrictive interpretation on the words "previously committed" when deciding what prior violent crimes can be used in establishing aggravating circumstances for sentencing purposes in capital felony murder cases.

In *Hill*, we explained that the reason for section (3) is to allow the state to show that the defendant has a character for violent crimes *or a history of committing such crimes*. This court then parlayed that reasoning to arrive at the conclusion that section (3) applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. Such reasoning and logic engrafts a restriction on the employment of section (3) that simply is not there.

Here, I have no problem reaching the conclusion that appellant's acts warranted the jury's consideration of the plain language used in section (3)—that he previously committed another felony, an element of which was the use or threat of violence to another person or created a substantial risk of death or serious physical injury to another person. Undisputably, appellant attempted to murder Cindy Warren outside the Warren house just moments before he entered the home where he killed both James and Sandra Warren. The majority holdings here and in *Hill* raise more questions than they answer. For example, if appellant had attempted to shoot Cindy an hour earlier—somewhere on the grounds but outside the house—could section (3) be employed? What would be the result if appellant's prior acts had happened the day before he entered the Warren house to kill James? In short, at what point in time and place may a defendant's prior violent acts be used to justify the usage of section (3)?

We become entrapped in our own webb, so-to-speak, when we add language to section (3) that is not there. The purpose, I submit, of section (3), is merely to permit a jury to consider a defendant's violent nature, as he had previously applied it towards others, regardless of when and where such violence occurred.

For the reasons stated, I would affirm William Parker's conviction and find no error in giving the instruction on previously committed felonies.

HAYS, J., joins in this dissent.

KEY NUMBER SYSTEM

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing Motion to the Hon. Jack Gillean, Assistant Attorney General, Tower Building, 4th and Center Streets, Little Rock, Ark. 72201 this 25 day of May, 1990.

JEFFREY M. ROSENZWEIG

Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986).

The proper standard to be used in releasing a juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986).

Validity of Procedure.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards against arbitrary or capricious imposition of the death penalty. Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 977, 98 S. Ct. 540, 54 L. Ed. 2d 471 (1977) (decision under prior law).

Voir Dire.

Defendants in a capital murder case are not permitted to voir dire the jury between the guilt phase and the penalty phase of the trial since subdivision (3) requires the same jury sit at both phases. Ruiz v. State, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Cited: Titus v. State, 268 Ark. 9, 593 S.W.2d 164 (1980); Heard v. State, 272 Ark. 140, 612 S.W.2d 312 (1981); Gruzen v. State, 276 Ark. 149, 634 S.W.2d 92 (1982).

5-4-603. Findings required for death sentence — Unanimity.

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

(1) Aggravating circumstances exist beyond a reasonable doubt; and

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(1) Aggravating circumstances do not exist beyond a reasonable doubt; or

(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make all findings required by subsection (a), the court shall impose a sentence of life imprisonment without parole.

History. Acts 1975, No. 280, § 1302; 1977, No. 474, § 11; A.S.A. 1947, § 41-1302.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Procedure, 5 UALR L.J. 123. Survey of Arkansas Law: Criminal Procedure, 6 UALR L.J. 119.

Jury's finding that the aggravating circumstances outweighed beyond a reasonable doubt any mitgating circumstances was supported by the evidence. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Burden of Proof.

State had the burden of proof on the issue of punishment for capital murder. Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 44, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

Discretion of Court and Jury.

This section provides that the jury shall impose a sentence of death if it returns certain written findings, but the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

Juries are not bound to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances; whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence.

Evidence sufficient to find that death penalty was not wantonly, arbitrarily or freakishly imposed, and was not excessive in relation to the crime and the jury's verdict was relatively free of passion or prejudice. Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence supported the jury's finding that defendant had previously committed another felony, an element of which was the use of threat of violence to another person. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Jurors.

This section contemplates that persons on the jury will be capable of imposing the death penalty; accordingly, it was not error for the trial court to strike for cause persons who stated that they could not under any circumstances impose the death penalty. Henderson v. State, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Cited: Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980); Simmons v. Lockhart, 626 F. Supp. 872 (E.D. Ark. 1985).

5-4-604. Aggravating circumstances.

Aggravating circumstances shall be limited to the following:

(1) The capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) The capital murder was committed for pecuniary gain; or

(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

(8) The capital murder was committed in an especially heinous, atrocious, or cruel manner.

History. Acts 1975, No. 280, § 1303; 1977, No. 474, § 12; 1985, No. 833, § 1; A.S.A. 1947, § 41-1303.

Cross References. Obstructing governmental operations, § 5-54-101 et seq.

CASE NOTES

ANALYSIS

Constitutionality.
Purpose.
Applicability.
Avoiding arrest.
Death penalty.
Due process.
Fear of detection.
Great risk of death to one other than victim.
Impermissible considerations.
Instructions.
Jury's discretion.
Parole.
Pecuniary gain.
Prior offenses.
Proof.

Constitutionality.

The defendant's argument that the capital murder sentencing statutes are unconstitutionally vague in that the aggravating circumstances of this section are too closely related to the elements of capital felony murder was explicitly rejected because the aggravating circumstances are not an element of capital murder. Henderson v. State, 279 Ark. 414, 652 S.W.2d 26 (1983), cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Purpose.

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated as irresponsible or dangerous. Reynolds v. State, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Applicability.

Subdivision (3) of this section applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. Hill v. State, 289 Ark. 387, 713 S.W.2d 233 (1986).

Avoiding Arrest.

A complaint and warrant for defendant's unlawful flight to avoid prosecution, was admissible to show that the shooting was for the purpose of avoiding or preventing a lawful arrest. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Death penalty statute was not unconstitutionally applied to defendant where the style of the murder suggested that the defendant committed the capital felony "for the purpose of ... preventing a lawful arrest." Woodard v. Sargent, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir. 1985).

The aggravating circumstance that the murder was committed to avoid arrest or to effect escape from custody was properly submitted to the jury and was not vague and overbroad where, under the facts of the case, the jury was justified in finding that defendant shot victim to increase his chances of avoiding arrest. Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983).

Although a consequence of every murder is the elimination of the victim as a

5-4-605. Mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) The youth of the defendant at the time of the commission of the capital murder;

(5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) The defendant has no significant history of prior criminal activity.

History. Acts 1975, No. 280, § 1304; A.S.A. 1947, § 41-1304.

CASE NOTES

ANALYSIS

Constitutionality.
Applicability.
Due process.
Emotional disturbance, mental disease, etc.
Evidence.
—Failure to present.
Fear of detection.
Instructions.
Religious and ethical considerations.
Totality of circumstances.
Youth of defendant.

Constitutionality.

The language used by the legislature in naming the various elements of mitigation could not be said to be vague and beyond the common understanding and practices of the ordinary man or juror so as to be constitutionally defective. Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976), aff'd, 261 Ark. 336, 548 S.W.2d 135 (1977) (decision under prior law).

The capital murder sentencing statutes are not unconstitutionally vague simply because this section does not contain a specific definition of "mitigating circumstance"; the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. Henderson v. State, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983), petition denied, 281 Ark. 406, 664 S.W.2d 451 (1984).

Applicability.

Mitigating circumstances, as typified by those listed in this section, are applicable only to the particular defendant, not to capital punishment in general. Simmons v. State, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Due Process.

Insofar as former section governing sentencing for capital felonies limited the jury's consideration of aggravating circumstances for sentencing purposes to those enumerated, but did not limit con-

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NO. 89-7631

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILLIAM FRANK PARKER — PETITIONER

v.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I.

THE PETITION WAS NOT TIMELY FILED

Parker's conviction and sentence were affirmed by the Arkansas Supreme Court on November 6, 1989. He did not file a petition for rehearing. By the Rules of this Court, his petition was due to be filed with this Court within 90 days of the affirmance by the Arkansas Supreme Court. See Rule 13 of the Rules of the Supreme Court of the United States. His petition was docketed with this Court on May 29, 1990, well after the 90-day time limitation had run. No extension of time was sought by the petitioner or granted by this Court for the filing of the instant petition.

Parker has argued that his failure to timely file the petition should be excused because he was not represented by counsel. While it true that the Arkansas Supreme Court did relieve Parker's attorneys from further representation of him, nothing is suggested that would have prevented Parker from asking this Court to appoint him counsel. Moreover, as his introduction it his petition mentions, Parker made it be known that he wanted to abandon his appeals and to be executed. In fact, he rejected the efforts of one of his present counsel to attempt to intervene in his case to pursue post-conviction relief. However, a few days prior to his execution scheduled for February 28, 1990, Parker

changed his mind and decided to fight his execution. The instant petition was not filed until May 29, 1990. Thus, rather than this being a situation where he was prevented, by lack of counsel, from filing a timely petition for certiorari, Parker waived his right to file a petition for certiorari by failing to exercise the option in a timely fashion. Therefore, this Court should decline to entertain the petition.

II.

PARKER WAS NOT PLACED IN DOUBLE JEOPARDY

Parker argues that his conviction for capital murder and sentence of death were entered in violation of the double jeopardy prohibitions of the United States Constitution. He contends that the Arkansas Supreme Court extended the "trial error" exception of the double jeopardy rules beyond what this Court has recognized and in a way that makes a nullity of the double jeopardy clause. He asks this Court to summarily vacate the conviction and sentence or to set the matter for plenary consideration to determine the applicability of the double jeopardy rules to this situation. The respondent asserts that no double jeopardy violation occurred in this case and urges the Court to deny the petition filed herein.

At his first trial, Parker was convicted of two counts of capital felony murder. In Parker's first appeal to the

Arkansas Supreme Court, his attorneys argued that his convictions for capital felony murder had violated the merger doctrine associated with the felony murder rule because the State had charged him with burglary/murder and the object of the burglary was the entry of the Warren home with the intent to commit murder. The Arkansas Supreme Court agreed and determined that the facts of the case could not support the State's legal theory contained in the information. According to the Court's opinion, the State adequately proved burglary and murder, but failed to prove that the murders were committed during the course of or in furtherance of the burglary. The Court noted that Parker could have been charged under subsection (1)(c) of § 41-1501 [now codified as Ark. Code Ann. § 5-10-101(a)(3)] for causing the death of two or more persons in the course of the same criminal episode. Parker v. State, 292 Ark. 421, 425-26, 731 S.W.2d 756, 758 (1987). Thus, the problem was in the way the charge had been filed (the State's legal theory of the case) not a deficiency in the State's proof. Parker did not challenge the sufficiency of the evidence in his first appeal. After the reversal of his first convictions, an amended information was filed charging Parker with one count of capital felony murder alleging that he acted with the premeditated and deliberated purpose of causing the death of any person, he caused the death of

James and Sandra Warren in the course of the same criminal episode.

In the case of Montana v. Hall, 481 U.S. 400 (1987), this Court reversed a Montana Supreme Court decision which held that Hall had been convicted of an offense which did not exist at the time of the crime, an ex post facto violation, and that the double jeopardy clause prevented his retrial. The facts of the Hall case indicate that Hall was charged with felony sexual assault for having assaulted the twelve-year-old daughter of his ex-wife. Hall's attorneys filed a motion to dismiss the information arguing that he could only be prosecuted for incest. The trial court agreed and granted the motion to dismiss. The State promptly filed a new information charging him with incest. He was convicted of incest. Hall appealed and the Montana Supreme Court granted him relief as noted above.

In overturning the Montana court's decision, this Court noted that:

> It is a "venerable principle[e] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction on any ground other than the insufficiency of the evidence to support the verdict, Burks v. United States, [437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141] (1978)], poses no bar to further prosecution on the same charge." United States v. Scott, 437 U.S. 82, 90-91, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978).

Montana v. Hall, 481 U.S. at 402. The Court went on to

state that, "It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument. E.G., United States v. Ball, 163 U.S. 662, 672, 41 L.Ed. 300, 16 S.Ct. 1192 (1896)." Id., at 404. Additionally, the Court stated:

> Although Montana's ex post facto law clause prevents Montana from convicting respondent of incest, we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual assault. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent. See Burks v. United States, supra. Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

Id., at 403.

In the case at bar, the respondent asserts that the State's proof at the first trial was not insufficient. Rather, the State's theory of the offense was not appropriate under Arkansas' capital murder statute. There was in effect, a deficiency in the charging instrument. The Arkansas Supreme Court did not reverse the previous convictions on grounds of Parker's guilt or innocence. Indeed, the Court noted in the first appeal that the killings Parker committed "were obviously a form of criminal

homicide of some degree." Parker, 292 Ark. at 425, 731 S.W.2d at 758. Based on the foregoing, the respondent asserts that Parker's claim of a double jeopardy violation is without merit.

III.

PARKER'S DEATH SENTENCE WAS NOT ENTERED IN VIOLATION OF THE EIGHTH AMENDMENT

Parker next argues that his case presents this Court with an opportunity to discuss the Eighth Amendment reliability requirement of a capital sentencing determination in light of contradictory penalty phase findings. He contends that the jury returned contradictory findings at the penalty phase of his trial with respect to aggravating and mitigating circumstances. The respondent cannot agree.

The jury unanimously found beyond a reasonable doubt that Parker previously committed another felony, an element of which was the use of threat of violence to another person. The verdict forms also indicate that one or more members of the jury believed, but the jury did not unanimously agree, that Parker had no significant history of prior criminal activity. Parker asserts that these findings are in conflict.

It easy to see that the jury could have unanimously found that Parker committed the prior violent felonies alleged by the State as an aggravating circumstance and for

some of the jurors to believe that these prior violent felonies did not constitute evidence of a significant history of prior criminal activity. There is nothing inherently contradictory about these findings and one does not have to speculate as to how the a juror might have reach both of these conclusions on the facts presented. Parker admitted in his brief on direct appeal that it was not impossible to reconcile these two findings. Indeed it is not impossible. It is not even difficult.

In the case of Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), the Arkansas Supreme Court was confronted with an argument similar to that now presented by Parker and noted the following:

> It is a matter of judgment whether the facts support the findings of the jury of aggravating and mitigating circumstances, but we will not substitute our judgment for the judgment of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory circumstances. The basic issue is whether, on the evidence, the jurors could sincerely and honestly have made the finding as they understood the question. If their answer to a question had been wholly arbitrary, a different problem would confront us. But here their answers were not arbitrary. We have before us a record of all the evidence presented to the jury to help us decide whether this jury acted capriciously in imposing the death sentence. We can put ourselves in the jurors' position and understand what they meant by answering the interrogatories as they did. That we

> might have interpreted an interrogatory differently does not require us to set aside a death sentence that was deliberately and conscientiously agreed upon by the persons who had the advantage of hearing the testimony as it was given.

Miller, 269 Ark. at 355, 605 S.W.2d at 439. Relying on the Miller case, the Arkansas Supreme Court rejected Parker's claim that the jury had rendered a death verdict based on inconsistent findings. Parker v. State, 300 Ark. 360, 368, 779 S.W.2d 156, 160 (1989).

In the case at bar, the State asserts that based on the evidence presented there was a reasonable and understandable application of the facts to the aggravating and mitigating circumstances by the jury. As such, no Eighth Amendment violation occurred. Therefore, this Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioner do not demonstrate that constitutional error has occurred. Therefore, for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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June 28, 1990

Mr. Joseph Spaniol, Jr.
Clerk
United States Supreme Court
No. 1 First Street, N.E.
Washington, D.C. 20543

Re: William Frank Parker V. State of Arkansas
October Term 1989, No. 89-7631

Dear Mr. Spaniol:

Please find enclosed for filing 12 copies of the respondent's brief in opposition to petition for writ of certiorari in the above-styled case. Opposing counsel has been served as indicated on the enclosed certificate of service.

Sincerely,

JACK GILLEAN
Assistant Attorney General
(501) 682-5321

JG/dc
Enclosure

NO. 89-7631

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILLIAM FRANK PARKER — PETITIONER

v.

STATE OF ARKANSAS — RESPONDENT

AFFIDAVIT OF MAILING

I, Jack Gillean, am a member of good standing of the Bar of this Court. I hereby state, pursuant to the Rules of the Supreme Court of the United States, that, to my knowledge, the requisite number of copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari were mailed June 28, 1990, by placing them in the United States Mail, postage prepaid, and designated as first class mail. The respondent's brief is due in this Court on June 28, 1990.

Respectfully submitted,

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Attorney General

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COUNSEL OF RECORD

STATE OF ARKANSAS)
) ss
COUNTY OF PULASKI)

SWORN to and subscribed before me this 28th day of June, 1990.

Debra Lynn Cooper
NOTARY PUBLIC

My Commission Expires:

September 10, 1990

SUPREME COURT OF THE UNITED STATES

WILLIAM FRANK PARKER *v.* ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 89-7631. Decided October 1, 1990

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, dissenting.

It is well established "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support conviction. *Burks* v. *United States*, 437 U. S. 1, 18 (1978). Nonetheless, the Arkansas Supreme Court concluded in this case that reversal for failure to prove an essential element of one statutory formulation of capital murder poses no bar to reprosecution under another statutory formulation of the same offense, because the State's decision to prosecute a defendant under the "wrong" murder statute is mere "trial error." Because I believe that this conclusion reflects a profound misreading of our double jeopardy precedents, I would grant the petition.

I

Petitioner was twice tried, convicted and sentenced to death for murdering James and Sandra Warren. He was initially convicted for felony murder on the theory that he had murdered the Warrens while burglarizing their home. The Arkansas Supreme Court reversed.[1] See *Parker* v. *State*, 292 Ark. 421, 731 S. W. 2d 756 (1987) *(Parker I)*. Reviewing the statutory elements of felony murder, the court con-

[1] The court affirmed petitioner's convictions for numerous other offenses, including attempted first degree murder, burglary, kidnapping and attempted capital murder, for which he was sentenced to life plus 130 years' imprisonment. These convictions are not at issue in the instant petition.

cluded that the State's felony murder statute "cannot be read to encompass the facts of this case." *Id.*, at 425, 731 S. W. 2d, at 758. The Arkansas capital felony murder statute requires the State to prove that the defendant caused the death of another "in the course of and in furtherance of the [underlying] felony." Ark. Code Ann. §5–10–101(a)(1) (1987 ed. and Supp. 1989). "The state's proof," the court explained, "showed that [petitioner] followed Mr. Warren into the house for only one purpose—to commit the murders of the Warrens." *Parker I*, *supra*, at 425, 731 S. W. 2d, at 758. "The killings were obviously a form of criminal homicide of some degree, but they were not 'in the course of and in furtherance of' the [charged] burglary as required to be capital felony murder." *Ibid.* The court noted that, under these facts, the State should have prosecuted Parker for ordinary capital murder rather than felony capital murder. *Id.*, at 425–426, 731 S. W. 2d, at 758.

Taking this last observation as an invitation to retry Parker, the State subsequently prosecuted Parker for "caus-[ing] the death of two . . . or more persons in the course of the same criminal episode." Ark. Code Ann. §5–10–101(a)(3) (1987 ed.). On appeal, the Arkansas Supreme Court rejected petitioner's contention that his reprosecution was barred by the Double Jeopardy Clause and affirmed petitioner's conviction. See *Parker* v. *State*, 300 Ark. 360, 779 S. W. 2d 156 (1989) *(Parker II)*. Reviewing its disposition in *Parker I*, the court concluded that it had reversed petitioner's original conviction not because the evidence was insufficient, but because the State had committed the "trial error" of "charging and trying [petitioner] under the wrong capital murder provision." *Id.*, at 363–364, 779 S. W. 2d, at 157. Consequently, the court held, its decision in *Parker I* posed no double jeopardy bar to reprosecuting petitioner under the applicable provision of the Arkansas capital murder statute. *Id.*, at 363–364, 779 S. W. 2d, at 157–158.[1]

[1]The petition for certiorari was not timely filed under Rule 13 of this Court, which requires that a petition be filed within ninety days of the

II

Our precedents recognize that the Double Jeopardy Clause bars reprosecution following reversal for insufficiency of the evidence but not following reversal for trial error. *Burks* v. *United States*, 437 U. S. 1, 15–17 (1978); accord, *Lockhart* v. *Nelson*, 488 U. S. 33, 39 (1988). The question posed by this petition is whether the original conviction of petitioner under the "wrong" capital murder statute was "trial error" in the sense in which our decisions have used that term.[2]

We discussed the difference between insufficiency of the evidence and trial error in *Burks* v. *United States*, *supra*. Reversal of a conviction is based on insufficiency of evidence, we explained, when the basis of the appellate court's disposition is the State's "failure of proof at trial." 437 U. S., at

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entry of judgment by a state court of last resort. However, the time requirements of our rules are not jurisdictional in criminal cases and may be waived by the Court "in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U. S. 58, 64 (1970); see *Sanabria* v. *United States*, 437 U. S. 54, 62, n. 12 (1978). In this case, petitioner's court-appointed counsel was relieved immediately following the affirmance of his second conviction, and there appears to be some question whether petitioner knowingly and competently waived his right to seek further review. In light of these circumstances, and in light of the manifest conflict between the decision of the Arkansas Supreme Court and this Court's precedents on the effect of reversal for insufficient evidence, I would waive the time requirements of Rule 13.

[2]The Arkansas Supreme Court in *Parker II* did not hold, and the respondent does not now argue, that petitioner's prosecution for "causing the death of two or more persons in a single criminal episode" was a *different offense* for double jeopardy purposes from the offense of capital felony murder for which petitioner was originally convicted. Such a contention would be hard to sustain, for the State clearly reproved the *conduct* for which petitioner was originally convicted—breaking into the Warrens' home and killing them—in order to establish essential elements of the offense of causing the death of two or more persons in a single criminal episode. See *Grady* v. *Corbin*, 495 U. S. —— (1990). In other words, if *Parker I* did indeed reverse petitioner's felony murder conviction for insufficient evidence, the State would not be free to prosecute petitioner for the same offense by merely charging him under a different statute, which is apparently what took place here.

16; accord, *Hudson* v. *Louisiana*, 450 U. S. 40, 43 (1981). Reversal for trial error—"incorrect receipt or rejection of evidence, incorrect instructions, . . . prosecutorial misconduct" or the like—"does not constitute a decision . . . that the government has *failed to prove its case*," but only "that a defendant has been convicted through a judicial *process* which is defective." *Burks* v. *United States*, *supra*, at 15 (emphasis added).

Under these principles, there should be no serious question that petitioner's conviction in *Parker I* was reversed for insufficiency of the evidence, not trial error. Based on "the facts of th[e] case," and on the "state's proof," the Arkansas Supreme Court concluded that the murders with which petitioner had been charged "were not [committed] 'in the course of and in furtherance of' the [charged] burglary." 292 Ark., at 425, 731 S. W. 2d, at 758. Even the respondent thus concedes that petitioner's conviction was reversed because the State "failed to prove its case" with regard to an essential element of Arkansas' capital felony murder statute. Brief for Respondent in Opposition to the Petition for Writ of Certiorari at 3 ("According to the Court's opinion, the State adequately proved burglary and murder, *but failed to prove* that the murders were committed during the course of or in furtherance of the burglary" (emphasis added)).

In my view, the preclusive effect of this determination cannot be avoided by characterizing as "trial error" the State's decision to prosecute petitioner under the "wrong" capital murder statute. Such a ruling, under these circumstances, amounts to the proposition that it is trial error to prosecute a defendant under a statute for which the State does not have enough evidence to convict, a semantic slight of hand that deprives the distinction between "trial error" and "evidentiary insufficiency" of any meaning. The unmistakable teaching of our double jeopardy jurisprudence is that the State may *not* avail itself of a second trial to remedy its mistake when it prosecutes a defendant for an offense that it is unable to

prove. See, *e. g.*, *Burks* v. *United States*, *supra*, at 11 ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding").

The apparent source of the Arkansas Supreme Court's confusion on this issue was its misreading of this Court's decision in *Montana* v. *Hall*, 481 U. S. 400 (1987) *(per curiam)*. In *Hall*, the defendant's original conviction for incest had been reversed on the ground that the state incest statute had not been in effect on the date of the charged criminal act. When the state subsequently charged the defendant under the state sexual assault statute, the state supreme court ruled that the reprosecution was barred under the Double Jeopardy Clause. This Court reversed. Characterizing the initial prosecution of the defendant under "the wrong statute" as "a defect in the charging instrument," the Court held that reversal on that basis did not bar reprosecution under the applicable sexual assault statute, *id.*, at 404, which the state supreme court had determined to be comprised of the same elements as the state incest statute, *id.*, at 402. The respondent argues that in this case, too, the decision to prosecute petitioner for felony murder "was[,] in effect, a deficiency in the charging instrument" that should not bar reprosecution under a different murder statute. Brief for Respondent in Opposition to Petition for Certiorari at 5.

In my view, the reasoning in *Hall* is wholly inapposite to this case. In *Hall*, the Court concluded that the State had prosecuted the defendant under the "wrong" statute not because the state *could not prove* that the defendant had violated the state incest statute, but because that statute was *legally inapplicable* to the defendant's conduct; indeed, this Court stressed that "there [was] no suggestion" in the decision reversing the defendant's original conviction "that the evidence introduced at trial was insufficient to convict [for incest]." 400 U. S., at 403. In this case, the "inapplicability"

of the capital felony murder statute to petitioner's conduct was *factual*, not legal.

The suggestion in *Hall* that the defendant's conviction had been reversed because of a "a deficiency in the charging instrument" is also unavailing in this case. This was an appropriate characterization of the State's decision in *Hall* to charge the defendant under the incest statute instead of the (legally identical) sexual assault statute, because the inapplicability of the incest statute would have required the *dismissal* of the State's information had this challenge been properly raised by pretrial motion. In contrast, the grounds for reversal of petitioner's original conviction was the failure of the state's proof *at trial;* nothing in the Arkansas Supreme Court's opinion in *Parker I* indicates that the capital felony murder count against petitioner was legally deficient *as charged*.

I would grant the petition in order to clarify the limited implications of *Hall*'s suggestion that prosecution under the "wrong" statute can be trial error for purposes of the Double Jeopardy Clause. Consequently, I dissent.

III

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would also grant the petition for certiorari and vacate the death sentence in this case.